

STATE OF NORTH DAKOTA

BOARD OF MEDICAL EXAMINERS

IN THE MATTER OF:)
)
North Dakota State Board of Medical)
Examiners - Investigative Panel A,)
)
Complainant,)
)
vs.)
)
Hunter A. Nicholas, M.D.,)
)
Respondent.)

**RECOMMENDED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

STATEMENT OF THE CASE, AND PROCEEDINGS

These proceedings arise upon a complaint dated October 15, 2003, which was filed with the North Dakota State Board of Medical Examiners (“the Board”) by John M. Olson, Special Assistant Attorney General, on behalf of the North Dakota State Board of Medical Examiners Investigative Panel A (“Investigative Panel A”), requesting disciplinary action against Hunter A. Nicholas, M.D. As grounds for discipline, the complaint alleged that Dr. Nicholas violated the conditions imposed by the Board by its order restoring his license subject to conditions within the meaning of N.D.C.C. § 43-17-31(9), and that he habitually used alcohol within the meaning of N.D.C.C. § 43-17-31(4).

The complaint also alleged that the continued practice of medicine by Dr. Nicholas would create a significant risk of serious and ongoing harm to the public, and that the immediate suspension of Dr. Nicholas' license is reasonably required to protect the public from that risk of harm. Investigative Panel A provided affidavits supporting those allegations, and requested that the

Board order the immediate temporary suspension of Dr. Nicholas' license under the emergency provisions of N.D.C.C. § 43-17-32. Finding clear and convincing evidence that the continued practice of medicine by Dr. Nicholas would create a significant risk of serious and ongoing harm to the public while a disciplinary proceeding is pending, and that immediate suspensions of his license was required to reasonably protect the public from that risk of harm, the Board issued its order of temporary suspension of Dr. Nicholas' license on October 15, 2003. The order of temporary suspension provided for the immediate suspension of License No. 8767 issued to Hunter A. Nicholas, M.D., to remain in effect until a final order is issued after a full hearing or appeal under N.D.C.C. § 43-17-32.1 or until the Board otherwise terminates the suspension.

The Board issued a notice of hearing providing for a hearing under N.D.C.C. § 43-17-32.1 to be held on October 22, 2003, at the Office of Administrative Hearings, Bismarck, North Dakota.

The complaint, together with the order of temporary suspension, a notice of hearing, and a list of witness which might be called and exhibits which might be offered for the hearing, including the affidavits of Rolf P. Sletten, Marijo DeMott and Patrick Haug, were personally served upon Dr. Nicholas on October 16, 2003.

The Board requested the designation of an administrative law judge by the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, upon the hearing of the complaint. Allen C. Hoberg, Director of the Office of Administrative Hearings, designated himself to serve as the administrative law judge for the hearing.

The hearing was held as noticed on October 22, 2003. Investigative Panel A appeared by John M. Olson, Special Assistant Attorney General. Dr. Nicholas did not appear for the hearing. Upon the unanticipated and unavoidable absence of Allen C. Hoberg, Al Wahl was duly desig-

nated to act in his place and stead for the conduct of the hearing and to recommend findings of fact, conclusions of law, and an order to the Board.

Considering the evidence of the testimony of the witnesses and the exhibits offered by Investigative Panel A and received, the following findings of fact, conclusions of law and order are recommended to the Board.

FINDINGS OF FACT

1. License No. 8767 was issued to Hunter A. Nicholas, M.D., by the Board; initially as a temporary license on June 4, 2001, and later as a permanent license on July 27, 2001. The license has been suspended pursuant to and in accordance with the provisions of N.D.C.C. § 43-17-32.1 by the order of the Board issued October 15, 2003, and has not been restored by the further order of the Board. (For convenience, this license is sometimes referred to as “the license” or “Dr. Nicholas’ license.”)

2. Dr. Nicholas’ license was first previously suspended indefinitely pursuant to the order of the Board issued March 22, 2002, pending completion of treatment for chemical addiction and a mental health evaluation, and until such time that he demonstrated to the Board that he was sufficiently rehabilitated to enable him to practice medicine in North Dakota. On July 26, 2002, the Board issued its order restoring Dr. Nicholas’ license to unconditional status upon finding that he had complied with all its conditions.

3. On January 10, 2003, Dr. Nicholas’ license was next previously suspended pursuant to a stipulation made between him and Investigative Panel A. The Board issued its order on April 4, 2003, upon that stipulation, restoring Dr. Nicholas’ license subject to conditions. The conditions were, in part, that Dr. Nicholas enroll in the impaired physicians program and fully comply with all the terms, conditions and requirements of the program, and that he fully comply

with all the conditions of probation which were imposed by the District Court, South Judicial District, Morton County, North Dakota, in Criminal Nos. 30-02-K-1187, 30-02-K-1227 and 30-02-K-1228. One of the conditions of both the impaired physicians program and his probation imposed by the district court was to refrain from the use of alcohol. Further conditions of the impaired physicians program required him to cooperate as requested for testing for his use of alcohol and drugs.

4. On October 15, 2003, Investigative Panel A filed a complaint with the Board, alleging, among other things, that Dr. Nicholas failed to comply with all of the Board's conditions for the restoration of his license; specifically, that he failed to comply with the requirements of the impaired physician program by using alcohol, as shown by a positive test for the use of alcohol on August 8, 2003, and by failing to appear for testing for the use of alcohol and drugs as he was requested and required to do; and that he failed to comply with the conditions of his probation imposed by the district court by using alcohol. The complaint further alleged the Dr. Nicholas' conduct in violation of the Board's conditions evidenced his habitual use of alcohol.

5. The greater weight of the evidence shows that Dr. Nicholas tested positive for the use of alcohol on August 8, 2003, and that he has repeatedly failed to both cooperate and appear for testing for the use of alcohol and drugs in accordance with the requirements of his participation in the impaired physicians program. Moreover, the evidence shows that Dr. Nicholas has sought to deceive the Board's executive secretary by providing false information concerning his employment to avoid required testing for alcohol and drug use, and the director of its impaired physicians program by acting to avoid her telephone calls to schedule testing for alcohol and drug use in accordance with the requirements for his participation in the impaired physicians program. Dr. Nicholas' conduct evidences a habitual use of alcohol.

6. On August 16, 2003, the Mandan Police Department investigated a complaint of a domestic disturbance involving Dr. Nicholas. Mandan police officers reported that they found Dr. Nichols acting belligerent and uncooperative, and that they could smell “an odor of alcoholic beverage coming from this person.” R., Ex. 1, p. 12. The use of alcohol is a violation of the conditions of probation imposed by the district court.

7. Dr. Nicholas has failed to comply with the conditions of the order of the Board issued April 4, 2003, restoring his license subject to conditions, and habitually uses alcohol.

CONCLUSIONS OF LAW

1. Dr. Nicholas was licensed to practice law by the Board in the state of North Dakota under the provisions of N.D.C.C. ch. 43-17; the license having been temporally suspended as allowed by law. He is subject to disciplinary action by the Board under N.D.C.C. §§ 43-17-30.1 and 43-17-32.1 for violations of N.D.C.C. § 43-17-31.

2. Under the provisions of N.D.C.C. § 43-17-32.1, the Board may impose an immediate temporary suspension of a physician’s license, and it did impose a temporary suspension of License No. 8767 issued to Hunter A. Nicholas, M.D., pursuant to and in accordance with the provisions of N.D.C.C. § 43-17-32.1. In accordance with the further provisions of N.D.C.C. § 43-17-32.1, the Board held a hearing regarding the temporary suspension of Dr. Nicholas’ license and proposed disciplinary action against him requested by the complaint last filed against him by Investigative Panel A, dated October 15, 2003.

3. Dr. Nicholas’ failures to comply with the conditions of the order of the Board issued April 4, 2003, constitute a violation of the provisions of conditions imposed by the Board within the meaning of N.D.C.C. § 43-17-31(9). Those failures are each and together grounds for discipline under N.D.C.C. § 43-17-31. Dr. Nicholas’ conduct in violation of the conditions of

the order of the Board issued April 4, 2003, persuasively shows the habitual use of alcohol within the meaning of N.D.C.C. § 43-17-31(4).

4. For conduct within the meaning of the provisions of N.D.C.C. § 43-17-31 proven at a hearing, the Board may impose such discipline as it may find appropriate under N.D.C.C. § 43-17-30.1, including revocation of the physician's license to practice medicine, and the Board may impose other discipline under N.D.C.C. § 43-17-31.1 such as requiring the payment of the reasonable and actual costs, including reasonable attorney's fees, incurred by the Board and its investigative panel in the investigation and prosecution of the disciplinary action.

5. The greater weight of the evidence showing that Hunter A. Nicholas, M.D., has repeatedly failed to comply with the conditions of the order of the Board issued April 4, 2003, within the meaning of N.D.C.C. § 43-17-31(9), that he has acted to deceive representatives of the Board to avoid compliance with those conditions, and that he habitually uses alcohol within the meaning of N.D.C.C. § 43-17-31(4); and considering the previous history of his discipline as a physician licensed to practice medicine in the state of North Dakota, it is appropriate that his license to practice medicine in the state of North Dakota be revoked, and that he be required to pay the reasonable and actual costs, including reasonable attorney's fees, incurred by the Board and its investigative panel in the investigation and prosecution of these proceedings.

RECOMMENDED ORDER

The greater weight of the evidence showing that Hunter A. Nicholas, M.D., has repeatedly failed to comply with the conditions of the order of the Board issued April 4, 2003, within the meaning of N.D.C.C. § 43-17-31(9), that he has acted to deceive representatives of the Board to avoid compliance with those conditions, and that he habitually uses alcohol within the meaning of N.D.C.C. § 43-17-31(4); and considering the previous history of his discipline as a physi-

cian licensed to practice medicine in the state of North Dakota, License No. 8767 issued to Hunter A. Nicholas, M.D., to practice medicine in the state of North Dakota shall be revoked, and he shall be required to pay the reasonable and actual costs, including reasonable attorney's fees, incurred by the Board and its investigative panel in the investigation and prosecution of the proceedings for his discipline.

Dated at Bismarck, North Dakota, this 28th day of October, 2003.

State of North Dakota
Board of Medical Examiners

By: _____
Al Wahl, Administrative Law Judge
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